No. 1218

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NORFOLK-SOUTHERN BUS CORPORATION,
PETITIONER (PLAINTIFF)

vs.

VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
RESPONDENT (DEFENDANT)

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

By S. BURNELL BRAGG,
Union Station, Norfolk, Va.
ARTHUR J. WINDER,
Union Station, Norfolk, Va.
JAMES G. MARTIN,
Western Union Bldg., Norfolk, Va.
J. KENYON WILSON,
Carolina Bldg., Elizabeth City, N. C.
Counsel.

LAWYERS PUBLISHING COMPANY, Inc.
RICHMOND 7, VIRGINIA

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To the Honorable the Supreme Court of the United States:

Norfolk Southern Bus Corporation respectfully prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Fourth Circuit directing that court to certify to this court the record in the case of *Norfolk Southern Bus Corporation* v. *Virginia Dare Transportation Company, Incorporated,* No. 5227

in that court, in order that the decision and judgment of said court rendered on January 7, 1947, may be reviewed. (Copy of opinion is at the end of this petition.)

This petitioner is informed that Virginia Dare Transportation Company, Incorporated, has filed or is about to file its petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit in this case, accompanied by a transcript of the record from the court below. This petitioner will oppose the petition of Virginia Dare Transportation Company, Incorporated on the ground that this case does not deserve review by this court, and does not ask that this petition be granted if the petition of Virginia Dare Transportation Company, Incorporated is denied.

The record being filed by Virginia Dare Transportation Co., Inc., we hereby refer to same without needlessly furnishing another copy.

STATEMENT OF THE MATTER INVOLVED

This action was brought by Norfolk Southern Bus Corporation (hereinafter for brevity called Norfolk Southern) in the Circuit Court of the City of Norfolk, Virginia, against Virginia Dare Transportation Company, Inc. (hereinafter for brevity called Virginia Dare) in December, 1944, being an action of assumpsit claiming $30,000 damages for services rendered by Norfolk Southern to Virginia Dare for pickup, delivery and terminal service in Norfolk, Virginia, and Elizabeth City, North Carolina, from October, 1940,

to December 31, 1944, being based on a *quantum meruit* for services actually rendered.

Virginia Dare removed the case to the United States District Court for the Eastern District of Virginia at Norfolk, on the ground of diverse citizenship, Virginia Dare being a North Carolina corporation, and Norfolk Southern being a Virginia corporation.

In the District Court Virginia Dare filed an answer denying liability, and making a counter-claim for $91,000.00, alleging Norfolk Southern had broken a contract with Virginia Dare dated June 6, 1940.

In January, 1946, a trial was partly had, but a mistrial declared because of the sickness of a juror.

On June 17, 1946, trial before a jury again began, and ended on June 22, 1946, the Court directing a verdict in favor of Virginia Dare on the original claim, and the jury rendering a verdict for $60,000.00 in favor of Virginia Dare against Norfolk Southern on the counter-claim, which verdict the Court refused to disturb, and judgment was rendered accordingly on July 3, 1946, and thereafter appeal duly perfected by Norfolk Southern.

The action brought by Norfolk Southern was assumpsit for services undoubtedly rendered and the theory of the action was that the law raised and compelled an implied promise by Virginia Dare to pay for the services and that public policy and Federal Law would not permit Virginia Dare to escape payment for the services received at a reasonable figure on a *quantum meruit*.

Virginia Dare, in its answer by way of denial and counter-claim, took the position that it had a valid

written contract with Norfolk Southern dated June 6, 1940, by which Norfolk Southern was to render the pickup and delivery and terminal service for Virginia Dare without any charge if Virginia Dare would not run more than two round trips between Norfolk and Elizabeth City each week, and that Virginia Dare had not run more than such trips, and so owed Norfolk Southern nothing; and that this contract went into force for five years thirty days after its date, so the first five years had not expired when Norfolk Southern refused further service at the end of December, 1944, so damages were due Virginia Dare for about 6 months refusal to serve under the original five years of said written contract, and damages were also due for an additional five years as a right to renew for five years was claimed, although renewal for five years was very indefinitely, if at all, pleaded by the answer and counter-claim.

Norfolk Southern answered the counter-claim, denying authority of its general manager, who had signed said written contract, to make such a contract, and averring that regardless of authority, such supposed contract was contrary to Federal Law and public policy, was plainly to stifle competition in interstate commerce, and was invalid and unenforceable.

The District Court ruled as a matter of law that the contract was valid and enforceable if authorized or ratified, directed a verdict for Virginia Dare on the original claim against it; left to the jury on the counter-claim, only the question of whether or not the contract was authorized or ratified by Norfolk Southern, the amount of damages on the counter-claim, and

whether Virginia Dare had demanded a 5-year renewal; and held that Virginia Dare had the right, by its sole act to renew the contract for five years.

The Circuit Court of Appeals for the Fourth Circuit, by its opinion and order of January 7, 1947, correctly held that the contract was null and void, and illegal, and so Virginia Dare could take nothing on its counterclaim; but also held that the parties were in *pari delicto,* and so Norfolk Southern could have no recovery on its *quantum meruit* for the pickup delivery and terminal services actually performed for Virginia Dare in interstate commerce.

FACTS

Stripped of useless details, the facts are: Virginia Dare was a carrier of freight by motor truck in interstate commerce with a franchise between Norfolk, Va., and Elizabeth City, N. C. (via Sligo, N. C.), and from Elizabeth City, N. C., on to Manteo, N. C., and also between Norfolk, Va. (via Sligo, N. C.), and Manteo, N. C. (without touching Elizabeth City).

Norfolk Southern procured a franchise to carry freight by motor truck between Norfolk, Va. and Elizabeth City, N. C., via Sligo, and was to start operating in competition with Virginia Dare between Norfolk and Elizabeth City shortly after June, 1940, actually beginning in October, 1940.

Before June, 1940, Virginia Dare had for sometime rented terminals at Norfolk and Elizabeth City, and did its own pickup and delivery at those places, or

arranged for it there; and was running one or more round trips *every day*, except Sunday, between Norfolk and Elizabeth City.

With this competition between the two carriers about to commence, the contract dated June 6, 1940, was signed. The legal department of Norfolk Southern, who usually drew all contracts, did not draw this contract, nor see it for several years. It was apparently drawn by Mr. Wickersham, General Manager of Norfolk Southern, and signed by him for Norfolk Southern, and a counterpart thereof was found in his files several years later, after he had become ill, but the counterpart in his files was dated "this ..... day of May, 1940."

The contract of June 6, 1940, having been made, Norfolk Southern got its franchise between Norfolk and Elizabeth City, and began operating trucks daily (except Sunday) between those points, and Virginia Dare, which had been operating daily (except Sunday) between those points discontinued service between those points except two round trips a week, one on Tuesday and one on Thursday, operating into Norfolk Southern terminals, and Norfolk Southern rendering, free of charge, all terminal and pickup and delivery services for Virginia Dare at Norfolk and Elizabeth City for all freight of Virginia Dare, even when its freight moved between Norfolk and Manteo direct, without touching Elizabeth City. Thus, all competition of these companies between Norfolk and Elizabeth City was prevented except on Tuesdays and Thursdays (which were left nominally for competition) and the public was deprived of service of Virginia Dare be-

tween those points except one round trip on Tuesdays and Thursdays.

The companies operated under this contract till the fall of 1944, when the legal department of Norfolk Southern decided it was illegal, and Norfolk Southern refused to continue its service after December 31, 1944, and sued for the services it had rendered, on a *quantum meruit.*

The contract in question between these two competing carriers, was never submitted to the Interstate Commerce Commission, but made by these carriers, and what was done under it was done by them on their own authority alone.

Supplementary Contract

Whereas:

(1) Virginia Dare Transportation Company operates common carrier (freight) Manteo to Elizabeth City and Elizabeth City to Norfolk and Manteo to Norfolk with terminals, facilities and service at Manteo, Elizabeth City and Norfolk;

(2) Norfolk Southern Bus Corporation has a contract with Virginia-Carolina for purchase operating rights (freight) Norfolk-New Bern via Elizabeth City, Edenton, Plymouth and upon approval by I.C.C. and Utilities Commission of North Carolina expects to operate (freight) service between Norfolk-New Bern via Elizabeth City, Edenton and Plymouth;

(3) The above mentioned companies have determined that friendly relations and mutual assistance in the efforts of these two companies to develop the territory, better serve the public, and provide necessary facilities for handling, are in the public interest, and will conduce financial stability and efficiency in operation and public service;

(4) There are possibilities for improvement in schedules and service by suitable re-arrangement of same, employment of common user facilities instead of useless duplication;

(5) Through rates will enable the shipper to transmit freight from the territory of one company to that of the other without needless transfer and at acceptable rates;

THEREFORE:

(1) It is understood in the interests of both of these companies that they will consult from time to time on matters of mutual interest and will seek to develop and apply such policies of cooperation and coordination as will represent the interests of both, and outline and propose such policies as will be to their mutual benefit and acceptance and which shall be compatible with regulatory policies and statutes enacted;

(2) They will publish and file joint rates for approval by the I.C.C. and Utilities Commission of North Carolina covering the shipments of commodities generally between points Elizabeth City and Manteo via Virginia Dare Transportation Company and points between

Norfolk and Elizabeth City via Norfolk Southern Bus Corporation and Manteo and Norfolk; and revenue from same shall be divided between the two companies as follows:

Points: Manteo-Norfolk and vice versa. Hauled by: Va. Dare. Revenue: Va. Dare. All.

Points: Norfolk-Manteo via E. City and vice versa. Hauled by: N. S. & Va. Dare. Revenue: Va. Dare, 65%; N. S., 35%.

Points: Norfolk-E. City and vice versa. Hauled by: Va. Dare. Revenue: Va. Dare. All.

Points: Norfolk-E. City and vice versa. Hauled by: Norfolk Southern. Revenue: Norfolk Southern. All.

It is understood that all published rates and divisions thereof are to be subject to such orders and requirements as shall be from time to time ordered by the I.C.C. or the State Commissions regulating such matters; and shall be in accordance with Federal and State statutes; and nothing herein contained shall be required of these companies or either one of them which is disapproved by such regulatory bodies;

(3) Norfolk Southern Bus Corporation will establish and operate a freight terminal at Norfolk with pickup and delivery service and will permit Virginia Dare Transportation Company the use of same on a joint user basis—it being understood, however, that so long as Virginia Dare Transportation Company operates two or less round trips per week between Norfolk and Elizabeth City, no charge will be made for common user or terminal service including pickup and delivery. In the event schedules exceed this, then

the tonnage so handled on additional trips will be allocated at the same unit costs as apply to Norfolk Southern Bus Corporation in the handling of its own business; it being understood that in the event the control of Virginia Dare Transportation Company shall be changed to other parties, then this agreement shall be null and void;

(4) Norfolk Southern Bus Corporation shall establish and operate a freight terminal at Elizabeth City and will permit Virginia Dare Transportation Company to use same on a *common user basis.* So long as Virginia Dare Transportation Company operates two round trips or less from Elizabeth City to Norfolk, no charge shall be made for this including pickup and delivery except that on business from Elizabeth City to Manteo, Virginia Dare will with its lay-over trucks make such pickup and when Norfolk Southern trucks do this at times when Virginia Dare trucks are not available, Virginia Dare will perform for Norfolk Southern Bus Corporation an equal service, based upon 100 lbs., when they are not in use in Elizabeth City.

The arrangements herein outlined in (3) and (4) may be discontinued on thirty (30) days written notice from Virginia Dare Transportation Company in which event the two companies will endeavor to arrive at a working plan satisfactory to both. No terminal charges shall be allocated to either company taking into consideration through tonnage on through trucks which do not receive or deliver said tonnage at Elizabeth City;

(5) At both terminals, service shall be performed in an efficient and prompt manner. In the event of

failure of either party to this contract to operate according to the purposes and intents set out in this contract, the company so affected will notify the other company of said failure or violation in writing and will request proper correction of same; and upon receipt of same, the company so operating or handling will without delay correct said condition that the purpose and intent of this arrangement be complied with.

This agreement shall be for a period of five years and both companies shall have the right to renew same for an additional five years if they so desire.

(6) The Virginia Dare Transportation Company and Norfolk Southern Bus Corporation will stagger schedules in such manner as to avoid duplication of departures at Elizabeth City and Norfolk contingent upon requirements of their territories and services;

(7) Each company will rent to the other truck equipment on the basis of twenty (20c) per mile, the charges to be reciprocal for similar classes of trucks, such rentals to be made where trucks are idle or available at Elizabeth City or Norfolk;

Insofar as same may be approved by the I.C.C. or Utilities Commission of North Carolina, trucks of either company operating between Elizabeth City and Norfolk may handle freight for the other company on such basis as may be agreed upon;

(8) Such matters of common interest as may develop from time to time will be considered and representatives of the two companies will consider and work for the expansion and protection of the business and in-

terests of the companies where it shall appear they have a common interest.

(9) The foregoing contract shall become effective within thirty (30) days after signing.

IN WITNESS WHEREOF, * * * * * etc.

BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW

We maintain that this court has jurisdiction on *certiorari*, because the Circuit Court of Appeals, in refusing recovery for Norfolk Southern on its *quantum meruit* for services actually rendered in interstate commerce, has decided an important question of federal law erroneously; that this decision is of great importance, and is contrary to public policy and proper handling of interstate commerce.

And that there are special and important reasons for the highest court to decide this question, pursuant to Rule 38, Section 5, and the Act of February 13, 1925, as amended; 28 U.S.C. Section 347(a); Judicial Code, Section 240(a).

1. The Circuit Court of Appeals in holding that "The parties are in *pari delicto* and neither may recover" has overlooked the doctrine of a long line of cases decided by this court of which *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467, is typical, to the effect that for every transportation service rendered by an interstate common carrier reasonable and appropriate compensation is not only im-

plied, but is also imposed as a duty which can be discharged only by payment. The aforesaid holding of the said Circuit Court of Appeals constitutes a decision of an important question of federal law in conflict with applicable decisions of this court and of the appellate courts of other circuits.

2. The holding of the court below permits Virginia Dare to escape by illegality what the law obliges it to pay.

3. The Transportation Policy of the United States, being to foster and support the transportation systems of the country, to see that they receive adequate compensation for services rendered, to insure uniformity without discrimination and to require all persons receiving benefits from carriers to pay for them alike; is violated by the aforesaid holding of the Circuit Court of Appeals, which erroneously grants immunity by reason of illegality.

4. The aforesaid holding of the Circuit Court of Appeals not only denies recovery to the plaintiff, which is held to be in *pari delicto*, but also does violence to the governmental policy of fostering and promoting the solvency of carriers by forbidding them to give free services.

5. And said holding is substantially in conflict with *Steele* v. *General Mills, Inc.*, decided by this Court January 6, 1947.

THE QUESTION PRESENTED

Is whether or not the Norfolk Southern is barred by the doctrine of *pari delicto* from recovering on *quantum meruit* for its services actually rendered Virginia Dare, because of the illegal contract between them; to-wit:

A. Whether defendant Virginia Dare Transportation Company, after receiving from Norfolk Southern Bus Corporation, both being common carriers in interstate commerce, terminal and pick-up and delivery service at the expense of Norfolk Southern can claim immunity from payment therefor by reason of an illegal agreement that such services should be furnished free of charge.

B. Whether the transportation policy of the United States, as set forth in the Interstate Commerce Act, Transportation Act (U. S. Code Title 49) and other pertinent statutes, so imposes on one common carrier by motor vehicle the obligation to pay another and competing motor carrier for terminal and pick-up and delivery services, as to forbid that the carrier receiving such service shall escape the obligation by reason of an illegal contract that no charge should be made.

C. Whether the doctrine of in *pari delicto* applies in a case wherein two interstate common carriers illegally contract that one shall furnish without charge a service for which the transportation policy of the United States imposes a charge.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons for granting the writ are that the Circuit Court of Appeals has erroneously decided an important question of federal law as to interstate commerce.

The error assigned is that the Circuit Court of Appeals held that Norfolk Southern was not entitled to recover for the pickup, delivery and terminal services actually rendered, because that court held that the rule of *pari delicto* barred Norfolk Southern, and that Virginia Dare did not expect to pay for the services because of the illegal contract.

We submit that the duty of Virginia Dare to pay for the services actually rendered in interstate commerce was absolute and fixed by law, regardless of the desires of either party.

If this were not true, Virginia Dare would get the advantage of an illegal contract contrary to federal law, and have services in interstate commerce rendered free.

We submit that the rule of *pari delicto* does not release Virginia Dare from a *quantum meruit* when public policy under federal law requires payment.

This is similar in principle to the case of *Steele* v. *General Mills, Incorporated*, decided by this court January 6, 1947, which held that a contract carrier which had agreed with the shipper for a rate less than legal is not barred, either by the doctrine of *pari delicto*, or by estoppel, from recovering the full legal rate.

The public policy of the United States with respect to transportation has been declared in the Preamble of the Transportation Act of September 18, 1940, C. 722, Title I, Section 1, 54 Stat. 899, (49 U.S.C., page 4281) in part in the following language:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation * * * so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * * to encourage the establishment and maintenance of reasonable charges for transportation service * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of commerce," etc.

This and other parts of the Interstate Commerce Act clearly indicate a purpose on the part of Congress to assure to all carriers a fair return for their services, not for their individual benefit, but for the good of the country as a whole.

Virginia Dare Transportation Company, Incorporated, the defendant in the court below, has heretofore filed, or is about to file, a petition for writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit rendered in this case, which petition will be opposed by this plain-

tiff. The petitioner (plaintiff) herein, Norfolk Southern Bus Corporation, while feeling aggrieved in the particulars above specified by the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, is presenting this petition only for the purpose of urging the errors above enumerated in the event that the petition of the said Virginia Dare Transportation Company, Incorporated is granted. If the petition of Virginia Dare Transportation Company, Incorporated is denied, this petition may likewise be denied, but if the petition of Virginia Dare Transportation Company, Incorporated is granted, this one should also be granted, in order that the whole case may be considered.

Respectfully submitted,

NORFOLK SOUTHERN BUS CORPORATION,

By S. BURNELL BRAGG,
Union Station, Norfolk, Va.

ARTHUR J. WINDER,
Union Station, Norfolk, Va.

JAMES G. MARTIN,
Western Union Bldg., Norfolk, Va.

J. KENYON WILSON,
Carolina Bldg., Elizabeth City, N. C.

Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 5527.

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

versus

VIRGINIA DARE TRANSPORTATION COMPANY,
INCORPORATED,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

(Argued November 15, 1946.
Decided January 7, 1947.)

Before SOPER and DOBIE, Circuit Judges, and CHESNUT, District Judge.

James G. Martin and J. Kenyon Wilson (S. Burnell Bragg and Arthur J. Winder on brief) for Appellant, and W. R. Ashburn and J. C. B. Ehringhaus (Ehringhaus & Ehringhaus on brief) for Appellee.

SOPER, Circuit Judge:

Two bus companies entered into a contract which gave rise to a claim and a counterclaim that form the subjects of this appeal. The validity of the contract is the prime feature of the controversy since the plaintiff corporation contends that the contract is invalid and brings suit for services rendered on the basis of a *quantum meruit*, while the defendant asserts the validity of the contract and files a counterclaim for its breach.

Prior to the execution of the contract, Virginia Dare Transportation Company was a carrier of freight by motor truck, operating under a franchise from the Interstate Commerce Commission between Norfolk, Virginia, and Elizabeth City, North Carolina, via Sligo, North Carolina, and thence to Manteo, North Carolina, and also between Norfolk and Manteo, without touching Elizabeth City. Some months before the inception of the contract Norfolk Southern Bus Corporation had entered into a contract, ultimately approved by the Interstate Commerce Commission, for the purchase of a franchise to carry freight by motor truck between various points in Virginia and North Carolina, including Norfolk and Elizabeth City, via Sligo, and was about to start operations. The contract was

executed on June 6, 1940, to become effective thirty days from that date. It recited the ownership of the similar franchises by the two companies and declared that they had determined that friendly relations and mutual assistance in the development of the territory and service of the public would conduce to the financial stability and efficiency of the companies, and would serve the public interest. Therefore, it was agreed that they would consult together and seek to develop policies of cooperation compatible with regulatory statutes and that they would publish and file joint rates for the approval of the Interstate Commerce Commission and the state commissions regulating such matters. Specifically it was agreed that Norfolk Southern would establish and operate freight terminals at Norfolk and Elizabeth City, with pickup and delivery service, and would permit Virginia Dare to use them on a joint user basis, and that so long as Virginia Dare should operate no more than two round trips a week between these terminals, no charge would be made for the facilities and services furnished; but if Virginia Dare should operate more frequently, the tonnage handled on the additional trips would be allocated at the same unit costs as applied to Norfolk Southern in handling its own business. The agreement was made for a period of five years beginning July 6, 1940, and provided that both companies should have the right to renew it for an additional period of five years.

Prior to the contract period, Virginia Dare had rented terminals at Norfolk and Elizabeth City, had performed or arranged for its own pickup and delivery service at those places, and was running one or more

round trips every day except Sunday. After July 6, 1940, Virginia Dare ran only two round trips each week on Tuesdays and Thursdays, and Norfolk Southern rendered all terminal and pickup and delivery services for Virginia Dare without charge. So the situation remained until the fall of 1944 when Norfolk Southern, upon the advice of counsel, declared the contract to be illegal, refused to continue further service to Virginia Dare after December 31, 1944, and brought suit for services rendered by it to Virginia Dare in the sum of $30,000. Virginia Dare defended the suit on the ground that the contract was valid and presented a counterclaim for breach of contract in the sum of $91,000. This sum it estimated to be its damages both for the remainder of the original five year period and for an additional five years for which it claimed that it was entitled to extend the contract under the renewal privilege.

Upon the trial the District Judge ruled that the contract was valid and directed the jury to render a verdict against Norfolk Southern on its claim, but left it to the jury to determine the damage to which Virginia Dare would be subjected by reason of the breach by Norfolk Southern during the period between January 1, 1945, and July 6, 1950. The jury found a verdict for Virginia Dare in the sum of $60,000.

The question as to the validity of the agreement turns to some extent upon its interpretation. Norfolk Southern contends that under the contract it agreed to furnish terminal facilities and pickup and delivery services to Virginia Dare at Norfolk and Elizabeth City without charge, if Virginia Dare would restrict

its operations between these points to two round trips per week. Virginia Dare conceded that it did actually confine its operations to two round trips per week during the four and a half years in which the arrangement existed, but contends that it did not surrender the right to make additional trips because the contract expressly provided that if its schedule exceeded two trips per week, it was to pay the costs of the tonnage handled on the additional trips. These conflicting contentions, arising from the language of the contract and the method of its performance during a substantial period of time, indicate that the contract is not free from ambiguity and that the District Judge was in error in refusing to receive in evidence certain letters and certain testimony which indicate quite clearly the understanding by the parties and the purposes for which the agreement was drawn up. This testimony, which was taken out of the presence of the jury and rejected, showed it to be the intention of the parties that Virginia Dare was to operate only two days a week instead of six days a week, as it had previously done, and that Virginia Dare was to be allocated one-third and Norfolk Southern two-thirds of the net business, and that the revenues were to be divided at the end of the month on a one-third—two-thirds basis.

This evidence was admissible, not only because it cleared up the ambiguity of the contract, but also because it indicated that the written instrument did not contain the entire agreement between the parties; and since the making of this contract and its performance were illegal acts, as we shall see, the court should not have applied the strict rule that extrinsic evidence

may not be received to vary the terms of a written agreement, but should have opened the way for the light that revealed the true intention of the transaction. See 1 Williston on Contracts (6th ed. 1937) §28A; 3 *id.* §627; 6 *id.* §1630A; Restatement, Contracts §600.

Virginia Dare seeks to avoid this conclusion by pointing out that the contract, as written, was susceptible of lawful performance and could have been lawfully performed for the rest of the first five-year period and all of the renewal period of five years, and that Virginia Dare is entitled to this performance and to damages for the breach, even though the methods actually employed during the preceding period were unlawful. But, we think that the interpretation given to the contract by the parties is the more reasonable and must control. It was not drawn by a lawyer and did not express as clearly as it might have done the obligation of Virginia Dare to abstain during two-thirds of the week; but its consistent and unbroken abstinence in this respect, the benefits it received thereby, and the division of the revenues on the agreed basis show all too clearly what the parties intended by the written document.

In effect, this interpretation and this performance restricted competition between the parties and reduced the transportation services and facilities available to the public in a manner which constituted in our opinion a violation of Section 1 of the Sherman Antitrust Act, 26 Stat. 209 (1890), 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1941), which provides that every contract in restraint of trade or commerce among the several states is illegal. The arrangement between the parties was

similar, except as to the extent of the monopoly, to that described in *Lee Line Steamers, Inc.* v. *Memphis, Helena & Rosedale Packet Co.*, 6 Cir., 277 F. 5, where two competing steamboat companies, each of which operated a steamer between two points on the Mississippi River, agreed to the division of the entire tonnage carried by the two lines, based on each steamer making two round trips each week, the earnings from the carriage of the tonnage to be settled for monthly on the basis of 50 per cent for each line. With respect to this agreement the court said: [page 9]

"* * * That a complete unification of river freight transportation between the points stated was contemplated and effected plainly appears by the terms of the contract, in connection with the concessions before referred to, including the provision for equal division of combined gross earnings, which effectually discouraged competition between the two lines with respect to furnishing facilities or bettering service—a monopoly made even the more certain by requiring the line failing to make its allotted number of trips to account to the other line on the basis of the average tonnage which it would have handled, and at the average price per ton which it would have received, if it had made the full number of scheduled trips. Plainly, the rights of the public were set entirely to one side, and it was left to the mercies of the combination."

We do not have a complete monopoly in the pending case because the parties here did not control the entire common carrier motor traffic between the terminals. There were four other motor carriers in the business, some of which later discontinued operations.

But an agreement in restraint of trade or competition in violation of the Act may occur even though a complete monopoly does not result. For example, it was said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, at 221, that any combination which tampers with price structures is engaged in an unlawful activity; and that, even though the members of the group are in no position to control the market, they directly interfere with the free play of market forces to the extent that they raise, lower or stabilize prices. *Cf. Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360, 374. The same rule is applicable to a combination whose result is substantially to restrict or cut down competition in the facilities and services previously offered by the parties to the public. *United States* v. *Eastern States Retail Lumber Dealers' Ass'n.*, S.D. N. Y., 201 F. 581, aff'd. 234 U.S. 600*; *United States* v. *St. Louis Terminal*, 224 U.S. 383, 236 U.S. 194. See *United States* v. *Great Lakes Towing Co.*, N.D. Ohio, 207 F. 733, 217 F. 656, appeal dismissed, 245 U.S. 675; *United States* v. *General Motors Corp.*, 7 Cir., 121 F. 2d 376, *certiorari* denied, 314 U.S. 618; *Johnson* v. *Schlitz Brewing Co.*, E.D. Tenn., 33 F. Supp. 176; *United States* v. *Swift & Co.*, D. Colo., 52 F. Supp. 476; *Monogehela Coal Co.* v. *Jutte*, 210 Pa. 288.

Moreover, the evidence in the instant case indicates that the combination of the parties was not without its effect upon the rates offered to the shippers by motor transportation. The rejected testimony included that

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*In this case the Supreme Court had no difficulty in concluding that the purpose of sending to the members of the retail dealers' association the names of wholesalers who sold at retail was to put the ban on such wholesalers, although there was no express agreement to that effect. See 234 U.S. at 608-609.

of the general freight agent of Norfolk Southern who testified that before the contract was entered into, Virginia Dare's first class rate was 32c and that in October, 1940, this rate was raised to 40c, in equality with the first class rate at which Norfolk Southern started business between the terminals. Furthermore, the rates of Norfolk Southern on certain articles were higher than those of Virginia Dare during the period of the performance of the contract so that one who shipped these articles by Virginia Dare on Tuesdays and Thursdays enjoyed a lower rate than if the shipments were made on other days of the week. The restriction of Virginia Dare to two days a week therefore tended to increase the cost of the transportation of these articles to the public.

Irrespective of the provisions of the Sherman Act, the contract between the parties lacked legal validity because it was in conflict with amendments to the Interstate Commerce Act. Chapter 8 of the Act was added on August 9, 1935, to bring the transportation of passengers or property in interstate commerce by motor carrier within the control of the Interstate Commerce Commission. See 49 U.S.C.A. App. §§ 301 *et seq.* (1945). Subsequently Section 5(1) of the statute was amended by the Act of September 18, 1940, so as to require the specific approval by the Commission of any contract between interstate motor carriers for the pooling or division of traffic or service. See 49 U.S.C.A. App. §5(1) (1945). It is obvious that the agreement between the parties was of the very kind at which the statute was directed, because the arrangement of the business, as shown by the correspondence between the

parties, contemplated that the traffic handled by them and the revenues derived therefrom should be divided monthly on the basis of one-third to Virginia Dare and two-thirds to Norfolk Southern.*

We have no difficulty in holding that it was unlawful for the parties hereto to enter into the contract except upon the specific approval by order of the Commission, and that their operation under the contract without securing such approval constituted an offense during each day of its continuance, 49 U.S.C.A. §10(1). See *Escanaba & Lake Superior R. R.* v. *United States,* 303 U.S. 315, 319; *In re Pooling Freights,* W.D. Tenn., 115 F. 588; Application of Texas & New Orleans R.R. Demurrage, 223 I.C.C. 437; Union Belt of Detroit Pooling of Revenues, 201 I.C.C. 577; Pooling of Passenger-Train Revenues and Services, 201 I.C.C. 699.

Nor is this conclusion affected by the fact that the agreement between the parties became operative before the amendment to the statute which subjected pooling agreements between motor carriers to the approval of the Interstate Commerce Commission. The declared will of Congress could not be thwarted by the continuance of the arrangement without the approval of the Commission after the amendment of the statute went into effect. See *Philadelphia, Baltimore & Washington R. R.* v. *Schubert,* 224 U.S. 603; *Louisville &*

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*We are not unmindful of the fact that agreements for the joint use of terminal facilities and for pickup and delivery service require no specific authorization from the Commission. Universal Cartage Co.—Purchase—Dixie Cartage Co., 37 M.C.C. 107, 110; Consolidated Freight Lines, Inc., Com. Car. Application, 11 M.C.C. 131, 136; but the agreement in suit also included a provision for the division of traffic and revenues therefrom.

Nashville R. R. v. *Mottley,* 219 U.S. 467. The agreement should have been submitted to the approval of the Commission after the amendment became effective, and since it was not, it fell within the interdiction of the statute and was therefore unlawful and void. See authorities collected in *Pittsburg Plate Glass Co.* v. *Jarrett,* M.D. Ga., 42 F. Supp. 723, 730, modified on other grounds, 5 Cir., 131 F. 2d 674; Restatement. Contracts §§ 457, 608; 6 Williston on Contracts (6 ed. 1938) §1759.

It follows, therefore, that Virginia Dare has no ground on which to base its counterclaim. The damages sued for are occasioned by the failure of Norfolk Southern to perform the very provisions of the contract which violate the relevant statutes; and there is no room for the doctrine, on which Virginia Dare in part relies, that contracts which are merely collateral to activities in violation of the Sherman Act may be enforced, and that legal portions of a contract which are severable from illegal sections thereof may be the subject of suit. For the same reasons the original suit of Norfolk Southern must fail; and in its case it may be added that until Norfolk Southern itself denounced the contract, Virginia Dare performed all the promises on its part, and that a contract to pay for services cannot be implied in the face of an express agreement that they shall be performed without charge if certain conditions are met. See *Municipal Waterworks Co.* v. *City of Ft. Smith,* W.D. Ark., 216 F. 431, 438; *Lueddecke* v. *Chevrolet Motor Co.,* 8 Cir., 70 F. 2d 345, 348; *Sickelco* v. *Union Pacific R.R.,* 9 Cir., 111 F. 2d 746, 750; *Jarka Corporation of Baltimore* v. *Pennsylvania*

R.R., D.Md., 42 F. Supp. 371, 376, aff'd., 4 Cir., 130 F. 2d 804, 806. *Cf. Baltimore & Ohio R.R.* v. *United States*, 261 U.S. 592, 598; *Ross Engineering Co.* v. *Pace*, 4 Cir., 153 F. 2d 35, 45; Restatement, Contracts §§ 514, 598; 5 Williston on Contracts (6th ed. 1937) §1630. The parties are *in pari delicto* and neither may recover.

The judgment of the District Court against Norfolk Southern on its original claim will be affirmed, and the judgment in favor of Virginia Dare on its counterclaim will be reversed and the case will be remanded to the District Court with instructions to enter a judgment against Virginia Dare on the counterclaim.

Affirmed in part, reversed in part, and remanded.